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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 235

WEST COAST MEAT COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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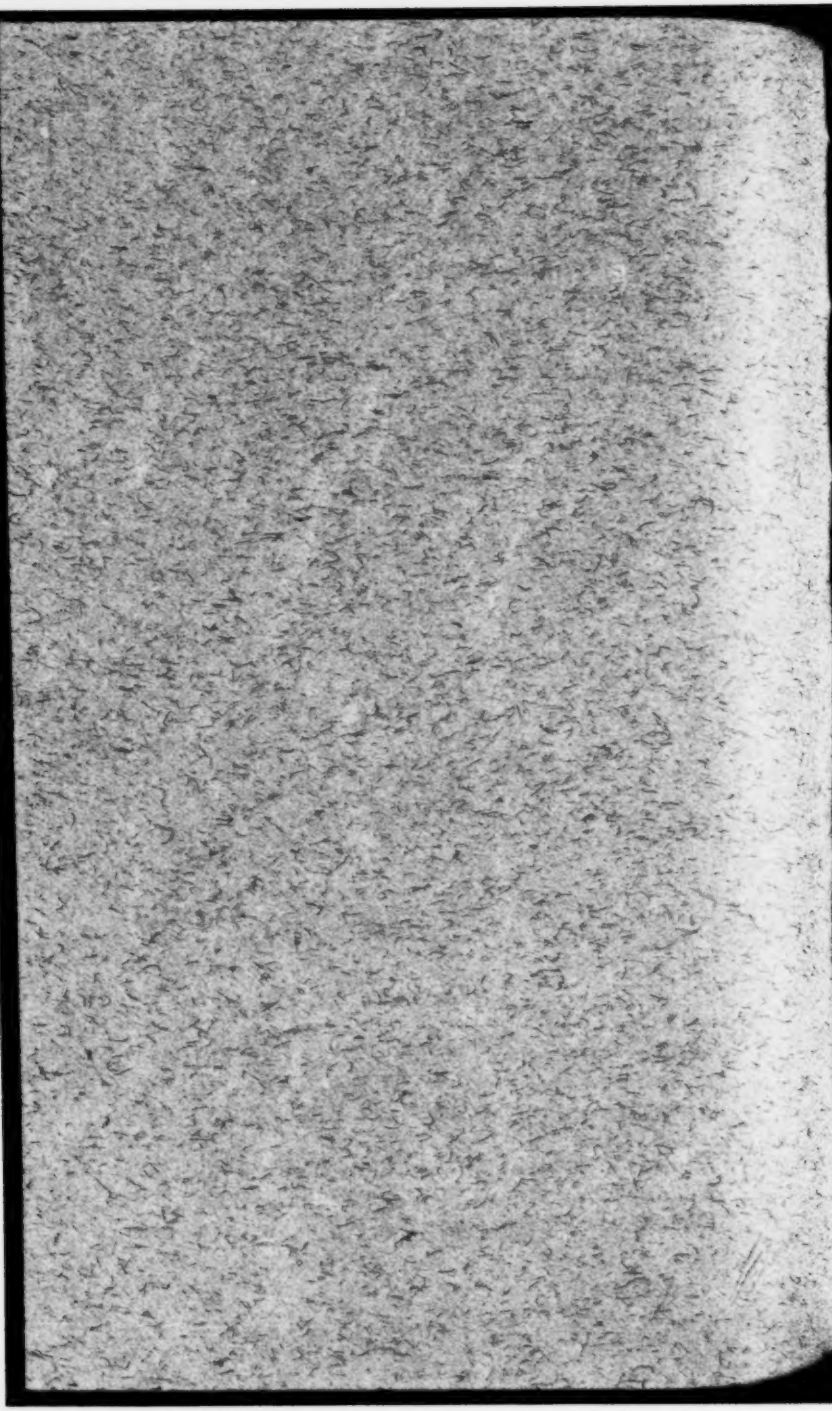

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

West Coast Meat Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in this case on June 30, 1952.

Opinion Below

The opinion below has not been reported. It is part of the Record at pages 19 to 24.

Summary Statement of the Matter Involved

The matter involves petitioner's claim to a special beef subsidy payable to non-processing slaughterers from No-

vember 1, 1943 through October 14, 1946 by Defense Supplies Corporation and Reconstruction Finance Corporation, in order to validate a concededly confiscatory maximum price ceiling imposed by the Price Administrator under the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 50 U. S. C. A. App., section 901).[1] Petitioner's claim has been denied by RFC solely on the basis of a "grandfather" clause adopted subsequent to petitioner's entry into business as a non-processor. The court below has upheld RFC on the theory that the court has no power to invalidate a discriminatory provision of the subsidy regulation, except it be so arbitrary and extreme as to equal a discrimination excluding non-processing slaughterers "who were Democrats, or Republicans, or red-headed".

The special beef subsidy was initiated by DSC by an amendment, dated October 31, 1943, to its meat subsidy regulation.[2] The amendment provided for the payment of the special subsidy, effective November 1, 1943, to non-processing slaughterers, who were defined, in pertinent part, as follows:

> "Non-processing slaughterer of beef" means an unaffiliated slaughterer as hereinafter defined *who during six consecutive months of 1942,* sold, and who currently sells, 98% or more, measured in dressed carcass weight of the total beef produced from cattle slaughtered by him in all his establishments, in the form of carcasses, wholesale cuts, boneless beef or ground beef. (Italics supplied)[3]

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[1] Defense Supplies Corporation, a corporation wholly owned by the United States, was the original subsidy agency. It was dissolved, effective July 1, 1945, and its functions transferred to RFC (10 F.R. 11155). During the period July 1 to July 25, 1946, the subsidy program was suspended, because of the temporary termination of price controls.

[2] Amendment No. 2 to Regulation No. 3, 8 F.R. 10826, 9 F.R. 1820.

[3] In June and July 1945, DSC and RFC by three amendments enlarged the base period to that from January 1, 1941 to October 1, 1943 and permitted the Director of Economic Stabilization to substitute any

The core of the instant dispute lies in the fact that petitioner's was a new business at the time the regulation was adopted, and it could not possibly comply with the base period requirement.

The special beef subsidy, like the basic meat subsidy, was not a grant or bounty paid by the sovereign's grace.[4] It was an integral part of the system of maximum ceiling prices imposed upon slaughterers by the Price Administrator under the Emergency Price Control Act of 1942.[5]

"representative period" in place of "six consecutive months". (Revised Regulation No. 3, Amendments 5, 7 and 8, 10 F.R. 8074, 11155). Although the amendments were drawn in the guise of general applicability, they were in fact tailored to provide prospective *ad hoc* relief to two slaughterers which had been declared ineligible to receive the special subsidy for base period reasons. See debate in Senate on Public Law 374 (80th Cong., 1st Sess., 61 Stat. 788), *Cong. Rec.*, p. 9811.

[4] "We have also previously pointed out that these subsidies were not mere gratuities or bounties but were closely articulated with the price control program and operated as compensatory in nature so as to validate a lower level of legal maximum prices than otherwise would have been permissible under the standards laid down in the Act for the guidance of the Price Administrator." *Armour and Company* v. *RFC*, 162 F. (2d) 918, 922 (Em. App. 1947).

[5] Section 2(e) of the Act (50 U.S.C.A. App., section 902 (e)) provided the basis for subsidy payments: "Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States . . . make subsidy payments to domestic producers of such commodity in such amounts, and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which had heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act as amended, such determination shall be made by the Federal Loan Administrator, with the approval of the President, and . . . such subsidy payments to domestic producers thereof may be paid only by corporations created or organized pursuant to such section 5d . . ."

Meat having been classified as a strategic or critical material by the President, the meat subsidy program was carried on by DSC and RFC as instruments of the Loan Administrator. See *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation*, 155 F. (2d) 525 (Emp. App. 1946), cert. denied 329 U.S. 737.

The subsidy was ordered by the Director of Economic Stabilization at the request of the Price Administrator, who conceded that established maximum ceiling prices were confiscatory with respect to non-processors, as compared with those slaughterers who engaged in processing operations and gained additional profit therefrom.[6]

In announcing the creation of the special subsidy, the Director of Economic Stabilization stated that it had been devised, in preference to raising maximum ceiling prices for the industry generally or lowering ceiling prices for live cattle, "to enable slaughterers who do not engage in the processing of beef—a group, made up principally of small enterprises, whose margins have been adversely affected under existing regulations—to continue in business."[7]

Petitioner, concededly a non-processing-slaughterer, was not in business in 1942. It was incorporated in the State of California on July 30, 1943. On August 9, 1943 it purchased an abattoir which had been operated under State inspection prior to November 30, 1939. On October 9, 1943, having repaired and improved it to comply with federal requirements, it applied to the United States Department of Agriculture for a license to operate as a federally inspected plant. In purchasing and renovating the abattoir petitioner spent approximately $14,000.

When the special subsidy was initiated, petitioner was awaiting its license to slaughter. No person could legally

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[6] See statement of Price Administrator quoted in opinion of court below (R. 23). See also *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation*, 155 F. (2d) 525, 528, 530 (Em. App. 1947), cert. denied 329 U.S. 737.

[7] Press release (OWI-2652, dated October 26, 1943), accompanying the Stabilization Director's directive to DSC, dated October 25, 1943. The Director had been delegated overriding authority over the price, wage and subsidy program (E.O. 9250, 7 F.R. 7871). His powers derived from the Emergency Price Control Act and the Stabilization Act of 1942 (56 Stat. 765, 50 U.S.C.A. App., section 961).

engage in the slaughtering business at the time, without a license from the Secretary of Agriculture or the War Food Administrator, to whom the President had delegated the priority and allocation powers granted to him by the Second War Powers Act.[8]

On November 5, 1943, petitioner received a license and a slaughter quota, pursuant to section (q)(1) of Food Distribution Order No. 75-1 which provided for such action when deemed "necessary to assure efficient distribution of meat for essential war and civilian needs."

The license was conditioned upon petitioner delivering to the armed services, which were permitted to use only federally inspected meat, 75 per cent of its beef, although established slaughterers were required to "set aside" only 50 per cent (R. 10).

On November 8, 1943, petitioner began its slaughtering operations as a federally licensed non-processing slaughterer, and continued so to operate through October 14, 1946, when price controls over slaughterers and the meat subsidy program were simultaneously terminated.

Petitioner applied to DSC for the special subsidy in early 1944 but was declared ineligible on the sole ground that it had not been in business during 1942 (R. 11). In accordance with the statutory procedure required by sections 203 and 204 of the Emergency Price Control Act of 1942 (50 U.S.C.A. App., sections 923 and 924) petitioner filed its protest with RFC, alleging:

(1) That the refusal to pay the special subsidy was based upon an erroneous interpretation of the regulation and thus was not in accordance with law; and (2) that the regula-

[8] 56 Stat. 176, 50 U.S.C.A. App., section 633; E.O. 9280, dated December 5, 1942, 50 U.S.C.A. App., section 601, note 7 F.R. 10179; E.O. 9322, dated March 26, 1943, 50 U.S.C.A. App., section 601 note, 8 F.R. 3807; Food Distribution Order 75, 75-1, 75-2, dated August 9 and 12, 1943, (8 F.R. 11119, 11325, 11327).

tion, as interpreted by DSC and RFC, was invalid in that it arbitrarily and without rational basis discriminated against those non-processing slaughterers who were not in business during the selected base period (R. 1).

RFC denied petitioner's protest, stating as its ground only that petitioner was not in business in 1942. It made no mention of Petitioner's attack on the validity of the regulation, and no attempt to set forth a justification for the discriminatory provisions (R. 5). From this denial, petitioner filed a timely appeal to the court below, in accordance with statute. That court ruled adversely to petitioner's claim and entered judgment dismissing petitioner's complaint on June 30, 1952.

The only basis ever advanced by the Government at any time for the discrimination against non-processors who began business after August 1, 1942, is contained in the statement of the Price Administrator which is quoted in the opinion below (R. 23). The Administrator there states "it was believed that the Administrator's legal duty to provide relief was limited to those who historically belonged to that segment [non-processors]." Beyond this bare statement of a purported legal obligation, no economic or other reasons have ever been advanced by the Government to support the discrimination here practiced.

Although it was denied the special subsidy, petitioner was able, by painstaking management, to survive the period of price control, which terminated on October 15, 1946. From the beginning of its operations in November 1943, through October 31, 1946 (two weeks after the price control and subsidy programs ended), petitioner had gross sales of $1,225,839.78 and reported a profit before income tax of $5,371.31. It computes that it is entitled to receive $30,000 in special subsidies, but for the illegal discrimination.

Jurisdiction

The judgment of the United States Emergency Court of Appeals was entered on June 30, 1952 (R. 25). The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, as amended (56 Stat. 31, 50 U.S.C.A., App., section 924(d)), and 28 U.S.C.A., section 1254.

Questions Presented

1. Whether the subsidy administrator, in establishing a subsidy for the sole purpose of validating a maximum price ceiling which is concededly confiscatory with respect to a a class of vendors, can declare ineligible some members of the class on the sole ground that they were not in business during a selected period prior to the establishment of the subsidy, without violating the provisions of the Emergency Price Control Act of 1942 or the requirements of due process of law?

2. Whether the subsidy administrator, in establishing such a subsidy, was required to observe the same standards of fairness and equity which Congress imposed upon the Price Administrator in the Act?

3. Whether the need for an adequate remedy does not entitle such a vendor to a judicial declaration of the illegality of an arbitrary discrimination in a subsidy regulation?

4. Whether the subsidy regulation foreclosed DSC and RFC from considering further the eligibility of those class members who had entered business subsequent to the selected base period?

5. Whether the court below erred in refusing to declare illegal the arbitrary exclusion of petitioner from the special subsidy program; in refusing to remand the matter to re-

spondent for further consideration and determination of petitioner's protest; and in dismissing its complaint?

Reasons for Allowance of the Writ

1. The decision of the lower court has an importance far beyond its effect on petitioner's claim under an expired statute. The subsidy power in question has again been granted by Congress, in the Defense Production Act of 1950, as amended (64 Stat. 801, 65 Stat. 133, section 303(c), 50 U.S.C.A. App., section 2093(c)); and the President has already taken steps to use the power in the present emergency (E.O. 10281, dated August 30, 1951, 16 F.R. 8789; General Order 13 of the Economic Stabilization Administrator, December 3, 1951, 16 F.R. 12237).

The tremendous impact of subsidies on the nation's business is evidenced by the great sums expended for them and the variety of products covered. RFC in its annual report for 1948, in referring to a write-off of more than six and a half billion dollars expended prior to June 30, 1947, stated that "a very substantial portion of [this sum] represented subsidies, and losses equivalent to subsidies, sustained by the Corporation under price stabilization programs at the direction of regulatory government agencies." The Secretary of Agriculture has testified that approximately one billion and a half dollars was spent on the meat subsidy program alone during the recent war. He has stated that another billion was spent on milk, and that approximately four billion were spent on food subsidies altogether (Hearings before the Senate Committee on Banking and Currency, Defense Production Act Amendments of 1951, 82nd Congress, 1st Sess., pp. 644-655). Meat, flour, milk, sugar, coffee, petroleum and its products, copper, lead, zinc were only some of the products subsidized in one form or another for stabilization purposes.

Today, as in the past, Congress has entrusted to the court below exclusive jurisdiction, reviewable only in this Court, of the validity of subsidy regulations and orders which are related to price controls (Defense Production Act of 1950, as amended, section 408, 50 U.S.C.A. App., section 2108; Emergency Price Control Act of 1942, as amended, section 204, 50 U.S.C.A. App., section 924). In the absence of action by this Court, the erroneous and dangerous doctrine adopted by the court below will stand unreviewed and unquestioned as controlling authority during the present emergency.

2. The lower court's decision directly threatens the right of business to operate free from unauthorized interference by federal officials, and the vindication of that right by judicial review. By its leave the zealous price or subsidy administrator is free to fashion the stabilization subsidy into a guillotine with which he may attempt to carve out the best of all possible business worlds, as he sees it. According to the lower court, subsidies which are vital because of confiscatory price ceilings, can be withheld upon such arbitrary consideration as size, location, affiliation or past history. So long as the Administrator refrains from acts of imbecility, such as excluding those individuals from receiving subsidy who are "Democrats, or Republicans, or red-headed," his regulations are safe from judicial review or restraint.

As it may be conjectured from some oblique language in the lower court's opinion, that the aggrieved business might curb the wayward subsidy administrator by bringing suit against the price administrator, it is pertinent to note that the legality of such a procedure is highly questionable and its inadequacy, in any event, obvious:

First, Congress has clearly provided for the right of direct judicial review of both subsidy and price regulations, and the lower court has recognized this in a long

line of subsidy cases, including the present. Indeed, at the inception of subsidy litigation in the court below, the court found it necessary to dispel some confusion as to correct procedure in subsidy suits. In *Illinois Packing Co.* v. *Bowles,* Em. App. 1945, 147 F. 2d, 554, the price administrator argued and the court found, with respect to subsidy regulations and orders, that the protest and review procedures of the Act were required to be pursued against the subsidy agency, and not the price administrator. It would certainly be an extraordinary legal procedure, which would have one complaining of discrimination in a subsidy regulation, file a protest with the subsidy agency; and when the protest was denied, have him file a protest and suit against the price official.

In addition, there is no case or other authority which would supply support for a suit against a price official, for the purpose of securing relief against a discriminatory subsidy regulation. In fact, the lower court's statement that it "might have power" to set aside such extreme provisions as it mentions, puts the litigant in hazard of guessing when to sue which official. The instance which the court cites as permitting a suit against the price administrator, is not one of discrimination and has no relevance to the problem. Of course, if no subsidy, or an inadequate subsidy was provided indiscriminately in the presence of a confiscatory ceiling price, the proper remedy would be a suit against the price official. But where an adequate subsidy is being paid to some and not to others on an arbitrary basis, the proper remedy is obviously to sue the subsidy agency for the removal of the illegal barrier to rightful participation.

Secondly, and most important, the injured business can hope to secure an adequate remedy only in a suit directly attacking the subsidy regulation. A suit attacking the price regulation could at best give it relief from future

oppression. The losses already incurred as the result of illegal action could not be recouped. On the other hand, if a finding of invalidity as to the discrimination is made and the matter remanded to the subsidy agency, it has the power to make the applicant whole by paying the subsidy claims which it had formerly dishonored. This procedure has been uniformly followed in those cases which have been remanded to RFC by the lower court, because of erroneous interpretations of the subsidy regulations. *King Packing Co.* v. *RFC*, Em. App. 1952, 196 F. 2d 514; *Borelli* v. *RFC*, Em. App. 1952, 196 F. 2d 730; *Belle City Packing Company* v. *RFC*, Em. App. 1948, 169 F. 2d 413; *Genser* v. *RFC*, Em. App. 1948, 169 F. 2d 136; *Consolidated Flour Mills Co.* v. *RFC*, Em. App. 1949, 177 F. 2d 206.[9] There is no cogent reason for not following this same procedure in cases involving premediated discrimination in the regulation itself. In each instance, a business has been illegally denied definitely computable sums of money which are intended to serve as compensation for losses suffered under a confiscatory ceiling price.

That the subsidy agency may have to develop new standards upon a remand, is not a valid ground for objection. The lower court has recognized that, although the subsidy agency acts as an instrument in carrying out the administrator's regulations, it has the power to develop standards to carry out the purposes of the regulations. *Berchem* v. *RFC*, Em. App. 1951, 191 F. 2d 922. Additionally, RFC is today the repository of all necessary powers and functions with respect to the meat subsidy programs (E.O. 9841, April 23, 1947, 12 F.R. 2645, 50 U.S.C.A. App. section 601 note; see *Evergreen Meat Co.* v. *RFC*, Em. App. 1951, 188 F. 2d 368).

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[9] See *Borelli* case at p. 735 for recognition of confiscatory nature of the ceiling price, so far as non-processors were concerned.

It is obvious, therefore, that regardless of the gloss placed upon the lower court's opinion, it has the inevitable effect of an abdication of the power entrusted to the court by Congress to review the use of subsidies by stabilization agencies in the past and present emergencies.

3. The court below has failed to hold the subsidy administrator to those standards of fairness and equity which Congress imposed upon him, as well as upon the price administrator. Both price and subsidy powers were granted by Congress in the broadest of terms, in the same section of the Act and as interrelated parts of a single pattern.[10] In addition, Congress made no distinction between price and subsidy powers in its grant of the power of judicial review.[11]

During the life of the price and subsidy programs, the lower court, indeed flatly stated the same standards were to be applied to subsidy as the price regulations. In *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation,* Em. App. 1946, 155 F. 2d 525, 531, cert. denied 329 U.S. 737, which directly involved the special beef subsidy, the court stated:

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[10] Section 2(c) of the Act provides with respect to prices: "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentials, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act" (50 U.S.C.A. App., section 902 (c); *cf.* Defense Production Act of 1950, as amended, section 704, 50 U.S.C.A. App., section 2154).

[11] Section 204 (b) provides, in pertinent part, that the lower court may enjoin or set aside, "in whole or in part", a subsidy or price regulation which "is not in accordance with law, or is arbitrary or capricious." Section 204 (d) provides: ". . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 . . . and of any provision of any such regulation, order or price schedule." See also section 203(a). (50 U.S.C.A. App. sections 923 (a) and 924 (b) and (d)). See *Illinois Packing Co.* v. *Bowles,* Em. App. 1945, 147 F. 2d 554. *Cf.* sections 407 and 408 of the Defense Production Act of 1950, as amended (50 U.S.C.A. App., sections 2107 and 2108).

> If a price regulation prescribed a maximum price for a commodity as applicable generally to a particular class of sellers, and then without any rational basis of differentiation prescribed a lower maximum price as applicable to an individual member or small group of that class, the latter provision would constitute an arbitrary and capricious discrimination. The same type of discrimination may be created in the establishment of subsidies as part of the price control program, as where, in lieu of a higher level of maximum prices, a subsidy is provided for a particular class of sellers, but a provision of the subsidy regulation arbitrarily excludes a member of the class from participation in the subsidy. Whether such discrimination is brought about in the price regulation itself or in any interrelated subsidy regulation, in either case this court has jurisdiction to set aside the discriminatory provision as being arbitrary and capricious.[12]

The reason for the lower court's change of mind has never been explained, except for summary references to the subsidy administrator's "very wide discretion in determining the extent to which subsidies would be granted." Even this comment is entirely extraneous to the problem of arbitrary discrimination against some members of a class to whom it has been decided a definite subsidy shall be paid. The price administrator has an equally wide discretion with respect to the imposition of ceiling prices, but it would not be argued that he could classify or discriminate under them without a rational economic basis.

4. There can be no doubt, that the discriminatory provision here involved is clearly illegal under the standards consistently applied by the lower court to the price administrator. Despite the great power delegated to the price administrator by the Emergency Price Control Act and the

[12] In *Flour Mills of America* v. *RFC*, Em. App. 1949, 179 F. 2d 965, 970, the lower court clearly implied that intentional discrimination would offend the standards required of the subsidy administrator.

Defense Production Act, the court has not hesitated to set aside regulatory provisions which it found to be not "generally fair and equitable", or discriminatory, or not calculated to serve the purposes for which the power was granted. *Davidson Meat Co., Inc.* v. *Arnall*, Em. App. 1952, 196 F. 2d 521; *Adrian, Inc.* v. *Fleming*, Em. App. 1947, 161 F. 2d 186; *Reliance Mfg. Co.* v. *Fleming*, Em. App. 1947, 158 F. 2d 990; *Reichel-Korfman Co.* v. *Porter*, Em. App. 1946, 155 F. 2d 730; *G. R. Kinney Co., Inc.* v. *Porter*, Em. App. 1946, 157 F. 2d 683; *Booth Fisheries Corp.* v. *Bowles*, Em. App. 1946, 153 F. 2d 449; *Hawaii Brewing Corp., Ltd.* v. *Bowles*, Em. App. 1945, 148 F. 2d 846, *Heinz* v. *Bowles*, Em. App. 1945, 149 F. 2d 277, 150 F. 2d 546; *Flett* v. *Bowles*, Em. App. 1944, 142 F. 2d 559.

It is clear beyond cavil that the Price Administrator could not have done directly what he here achieved under cover of the discriminatory special subsidy. In the *Hawaii Brewing* case, *supra*, the court below, conceding that price differentials could be established, went on to say at p. 850:

> But this does not mean that different pricing standards may be applied to members of the same industry in the same locality without a showing of facts justifying the differentiation. It is essential to fair treatment that all persons who are similarly situated be dealt with on an equal basis; that no greater burdens be laid upon one than are laid upon others in the same calling and condition.

In the instant case neither the Price Administrator nor any other official has even pretended that the discrimination against petitioner, and others similarly situated, could be justified by economic considerations.

[13] Under the regulation, any slaughterer who had the required six-month record in 1942 was "basically" eligible for the special subsidy, even though it had been operating as a processor throughout 1943. It could become "currently" eligible at any time and irregularly, if it wished, by simply discontinuing its processing. Yet petitioner, which concededly could not turn to processing, was "basically" and permanently ineligible.

Certainly, the discrimination in the special subsidy regulation had no relation to an effectuation of the purpose of the Act. Admitting the petitioner, and others similarly situated, to the special subsidy program could not possibly effect prices to the consumer or disturb by an iota the stabilization process. Exclusion from the program, on the other hand, contravened the mandate of Congress that production was to be encouraged and enlarged by the use of subsidies. The sole effect of the administrator's fiat was to curtail production to the extent it drove non-processing slaughterers out of business. *Cf. Genser* v. *RFC*, Em. App. 1948, 169 F. 2d 136, 141.

The discrimination practiced is entirely alien to any relationship with price matters. As it stands, unexplained by the documentary material from the administrator's files, it can be construed as nothing else than an illegal attempt to meddle in the control of productive facilities, a power delegated to and exercised by the Secretary of Agriculture and the War Food Administrator. Whatever faults price officials may have found with their policy of licensing new firms, as they did petitioner, where considered necessary for the greater production of federally inspected meat,[14] neither the price or subsidy administrator, or the Director of Economic Stabilization, had the power to exercise that command over production which had been reserved by Congress and the President to other agencies of the Government.

Stabilization subsidies could not be used legally as a device to restrict the number of production facilities or to effect a realignment of them.

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[14] *Studies in Food Rationing* (1947), Part VI, Livestock Slaughter Controls, pp. 315-344. This pamphlet is General Publication 13 in a series of historical reports by the Office of Price Administration and the Office of Temporary Controls.

Finally, the discriminatory provision is so patently arbitrary and capricious, and so clearly calculated to destroy petitioner's business and those of others similarly situated, that it must be said to deprive petitioner of its property without due process of law. The ability of petitioner to survive the period of price controls does not remove the constitutional question. Complainant was entitled to the full exercise of its property, free of crippling discriminatory regulation. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 57 S. Ct. 364; *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 52 S. Ct. 87; *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, 43 S. Ct. 158; see *Hirabayashi* v. *United States*, 320 U. S. 81, 100, 63 S. Ct. 1375 and cases there cited.

5. The lower court erred in finding that the subsidy regulation was intended to foreclose petitioner from the special subsidy, without further consideration. The statement of the Price Administrator clearly is limited to slaughterers who might seek to enter the field subsequent to the inception of the program, and to those who had a record of business operations in 1942. The *Rosenthal* case, *supra*, involved slaughterers whose plants were in operation during 1942. There is no evidence whatsoever in the record upon which the lower court could find that respondent had consistently followed the interpretation here insisted upon. The denial of petitioner's protest (R. 5) makes no mention of such a practice. In addition, the three amendments issued in 1945 to the subsidy regulation, clearly indicate that further consideration was being given to cases of ineligibility.

It is obvious that the said amendments actually represented administrative relief on an *ad hoc* basis. Petitioner's case was certainly equally deserving of relief, and its reliance upon respondent to remedy an obvious wrong was entirely justifiable. It was respondent's duty to treat all applications equally under the same standards. *Cf.*

Berchem v. *RFC, supra.* By the same token, if respondent chose to refer hardship cases to the Director of Economic Stabilization for action, respondent was fairly obligated to refer all such cases to him so that justice might be applied evenly.

Conclusion

Accordingly it is respectfully submitted that this petition should be granted.

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July 29, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 235

WEST COAST MEAT COMPANY, *Petitioner*

v.

RECONSTRUCTION FINANCE CORPORATION

On Petition for a Writ of Certiorari to the United States Emergency Court of Appeals

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 19-24) is not yet reported.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on June 30, 1952 (R. 25). The jurisdiction of this court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 31, 50 U.S.C. App. 924(d)), and 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the provision in a World War II meat subsidy regulation limiting the special non-processing slaughterers' subsidy, payable after November 1, 1943, to businesses which had been engaged as such non-processing slaughterers during a base period prior to October 1, 1943, is valid.

2. Whether, as a matter of interpretation, this regulation did limit the special non-processing slaughterers' subsidy to businesses which had been so engaged during the base period.[1]

REGULATION INVOLVED

Pursuant to a directive of the Office of Economic Stabilization (8 F.R. 14641), Defense Supplies Corporation[2] amended its Regulation 3 (8 F.R. 10826)[3] to provide an additional subsidy for cattle slaughtered by non-processing slaughterers. This amendment (Amendment 2) (9 F.R. 1820, 32 C.F.R. (1944 Supp.) 7003.14) added a new section, which in pertinent part is as follows:

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[1] The petition poses five questions for consideration. We believe that a determination of the two questions stated above will be dispositive of petitioner's contentions.

[2] Defense Supplies Corporation was dissolved on July 1, 1945, and its functions transferred to the respondent, Reconstruction Finance Corporation, by the Act of June 30, 1945, 59 Stat. 310. Regulation No. 3, as amended, was taken over and administered directly by R.F.C. (10 F.R. 11155).

[3] Regulation No. 3, as amended, was carried forward into Revised Regulation No. 3, issued by Defense Supplies Corporation, effective January 19, 1945. (10 F.R. 4241).

§ 7003.14 *Extra compensation for non-processing slaughterers of beef—(a) Definitions.* (1) "Non-processing slaughterer of beef" means an unaffiliated slaughterer as hereinafter defined who during six consecutive months of 1942, sold, and who currently sells, 98% or more, measured in dress carcass weight, of the total beef produced from cattle slaughtered by him in all his establishments, in the form of carcasses, wholesale cuts, boneless beef or ground beef.

Amendment 5 (10 F.R. 8074, 32 C.F.R. (1945 Supp.) 7003.1(s)), issued in compliance with Office of Economic Stabilization Directive No. 56 (10 F.R. 7117), enlarged the base period requirement to include:

> [unaffiliated slaughterers] who, during six consecutive months between January 1, 1941, and October 1, 1943, sold, and who currently sells, 98% or more, measured in dress carcass weight, of the total beef produced from cattle slaughtered by him in all his establishments in the form of carcasses, wholesale cuts, boneless beef, or ground beef.

Amendment 7 (10 F.R. 11155, 32 C.F.R. (1945 Supp.) 7003.1(s)), issued in compliance with Amendment 1 to Directive 56 of the Office of Economic Stabilization (10 F.R. 8476), provides that:

> [unaffiliated slaughterers] who during six consecutive months, or during such other representative period as may be determined by the Director of Economic Stabilization, within the period between January 1, 1941, and October 1, 1943, sold, and who currently sells, 98% or more, measured in dress carcass weight, of the total beef produced from cattle slaughtered by him in all his establishments in the form of carcasses, wholesale cuts, boneless beef, or ground beef.

STATEMENT

This case arises out of the denial of petitioner's claim as a non-processing beef slaughterer to extra compensation subsidies as provided by Amendment 2 of Regulation No. 3, *supra,* pp. 2-3, of the Defense Supplies Corporation.

The West Coast Meat Company is a corporation which was chartered on July 30, 1943, by the State of California for the purpose of engaging in the slaughtering business. In August 1943, petitioner purchased an abattoir which had been standing idle since 1939 (R. 9). Inspections were made by the Departments of Agriculture of the United States and the State of California, and after necessary repairs and improvements were effected, state and federal slaughtering licenses were issued and slaughtering operations commenced on November 8, 1943 (R. 3-4).

Prior to November 1, 1943—and during the time petitioner was preparing to operate—a Defense Supplies Corporation regulation (Regulation No. 3) provided for payment of a basic meat subsidy to cattle slaughterers. In compliance with a directive of the Office of Economic Stabilization, issued October 25, 1943, Defense Supplies Corporation amended its subsidy regulation so as to provide, in addition to this basic meat subsidy, a special subsidy to be paid to the non-processing slaughterers of the slaughtering industry. As a condition to eligibility for this additional compensation, the regulation required that the non-processing slaughterer have been engaged as a non-processing slaughterer of beef for six consecutive months of 1942 (*supra,* p. 3). For failure to meet this qualification, the petitioner's application for additional compensation was denied in April, 1944 (R. 11-12).

A formal protest was filed on December 13, 1950, in which it was alleged that the claim to the additional subsidy was payable under the provisions of Regulation No. 3, as amended, and that, to the extent that the regulation and directives required a contrary finding, they were "illegally discriminatory" against the petitioner and others similarly situated (R. 1). The protest was denied November 5, 1951, for the reason that the petitioner did not have the qualifying base period history, and since it was unable to establish its eligibility for

the extra compensation Reconstruction Finance Corporation could not legally pay the claim (R. 5-7).

A complaint was duly filed with the Emergency Court of Appeals in which petitioner reasserted the contentions previously stated in the protest (R. 12-15).[4] The court found that the base period requirement of the subsidy regulation was clear and unambiguous and, as determined by respondent, that the petitioner did not meet the eligibility requirements of the subsidy regulation. Considering the attack upon respondent's denial of the protest as a challenge to the validity of the controlling regulation, the court concluded that a rational basis existed for the base period requirement, and accordingly dismissed the complaint.

ARGUMENT

This case raises primarily the question of the validity of a provision of a meat subsidy regulation of World War II, which by its terms clearly excludes the petitioner.[5] A final resolution of the

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[4] Petitioner does not challenge the amount of the basic subsidy paid to it (R. 12-15).

[5] The words of the regulation are so clear (*supra*, pp. 2-4) that we need not stop to elaborate an answer to petitioner's subordinate contention that the regulation did not prohibit the award to it of the special non-processing slaughterers' subsidy. As the Emergency Court of Appeals said: "What complainant [petitioner] is asking us to do is not to interpret the language of the regulation, but to insert a qualification therein that the base period requirement shall be applicable only if an applicant was in the slaughtering business during the base period" (R. 22).

question by this Court can serve little future purpose inasmuch as the possibility of similar litigation is at best doubtful because of the December 15, 1950, deadline for protesting denials of World War II subsidy claims. R.F.C. Reg. 11, 15 F.R. 6193. The petition points to no regulation under the Defense Production Act of 1950, Ch. 932, 64 Stat. 798, 50 U.S.C. App. (Supp. V) 2061 *et seq.*, which might give rise to a like question. The decision of the court below is clearly correct, presents no conflict, and does not call for review by this Court.

1. At the time petitioner was incorporated and when it purchased the idle facilities which it later used, there was no provision for paying an additional subsidy to non-processors; nor had petitioner commenced operations when the additional subsidy became effective on November 1, 1943. *Supra*, p. 4. Under such circumstances it is difficult to see how there could have been "premeditated discrimination" (Pet. 11) either in the regulation or in the directive of the Office of Economic Stabilization which gave rise to it. On the contrary, the policy was that that segment of the slaughtering industry which had traditionally and historically been engaged in non-processing operations be protected, and at the same time the aim was not to encourage processing slaughterers to abandon their processing operations or to encourage newcomers to enter the field in order to avail themselves of the special

subsidy. This, we submit, constitutes a rational basis for confining the subsidy to those slaughterers who had been engaged in non-processing operations prior to November 1, 1943, the effective date of payment of the additional subsidy. *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation,* 155 F. 2d 525 (Em. Ct. App.), certiorari denied, 329 U.S. 737.[6]

We do not know whether the Office of Economic Stabilization and Reconstruction Finance Corporation would have been justified in extending the additional subsidy to those who entered the non-processing field, or who converted to non-processing operations, after October 31, 1943.[7] But the issue here is not whether the administrative officials would have been warranted in extending the special subsidy, but, rather, whether they were compelled to do so. That there was no such requirement is plain from the rational and adequate distinction between those slaughterers who had historically been non-processors and those who en-

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[6] See the administrator's statement quoted in *Ben H. Rosenthal & Co.* v. *Porter,* 158 F. 2d 171, 175-176 (Em. Ct. App.), petition for a writ of certiorari dismissed on petitioner's motion, 330 U.S. 802 (see op. below, R. 23). As to the validity of the so-called "grandfather clause", see *Oswald & Hess Co.* v. *Bowles,* 148 F. 2d 543, 545 (Em. Ct. App.), certiorari denied, 325 U.S. 871.

[7] The base period, which was initially limited to six months during 1942, was ultimately extended to include the period between January 1, 1941, and October 1, 1943. See Amendments 5 and 7, *supra,* pp. 3-4.

tered the business in the midst of the war. It is significant, on the issue of arbitrariness, that petitioner operated at a profit, however small (R. 2), but, at any rate, it was within the discretionary power of the appropriate administrative authorities, rather than the courts at this late date, to determine whether the line should be drawn as it was. *Illinois Packing Co.* v. *Snyder,* 151 F. 2d 337 (Em. Ct. App.); *Flett* v. *Bowles,* 142 F. 2d 559 (Em. Ct. App.).

Controlling regulations promulgated by the Reconstruction Finance Corporation were at all times issued in compliance with the directives of the Office of Economic Stabilization (*supra,* pp. 2-3), which, by Executive Order 9250 (7 F.R. 7871), was given overriding authority "to issue directives on policy" to the various federal agencies concerned with the price control program and the related subsidy programs. The petitioner at all times received the basic meat subsidy paid to all slaughterers. It now in effect asks the Court to broaden the segment of non-processing slaughterers eligible for the additional subsidy and thereby materially alter the subsidy program as formulated by those authorities whose responsibility it was and whose peculiar knowledge of the over-all economic situation qualified them to do so. We submit that this is not the function of the Emergency Court of Appeals. See *Flour Mills of America* v. *Reconstruction Finance Corporation,* 179 F. 2d 965 (Em. Ct. App.); *Flett* v. *Bowles, supra; Danz* v. *Reconstruction Finance Corporation,* 193 F. 2d 1010 (Em. Ct.

App.); *Hillcrest Terrace Corp.* v. *Brown*, 137 F. 2d 663, 668 (Em. Ct. App.); *Evergreen Meat Company* v. *Reconstruction Finance Corporation*, 188 F. 2d 368 (Em. Ct. App.).

2. Even if there were more merit to petitioner's claim of harsh treatment, the decision below would be correct. The mere fact that an individual slaughterer fails to qualify for the special subsidy does not render the regulation invalid. As was said in *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation*, 155 F. 2d 525, 532 (Em. Ct. App.), certiorari denied, 329 U.S. 737, "considerations of administrative workability may render it impracticable to provide complete individualization of treatment." Cf. *Ben H. Rosenthal & Co.* v. *Porter*, 158 F. 2d 171 (Em. Ct. App.), petition for certiorari dismissed on petitioner's motion, 330 U.S. 802. From a practical viewpoint it seems obvious that the administration of the subsidy program required a definition of the class of slaughterers eligible for the additional compensation; whatever the definition might have been, it was to be anticipated that borderline cases would inevitably arise, but this is hardly a ground for declaring a regulation arbitrary or capricious or enough to empower a court to administer relief on an *ad hoc* basis. *Counselman* v. *Fleming*, 161 F. 2d 203 (Em. Ct. App.), certiorari denied, 331 U.S. 861. Viewed in its entirety and in its war-time setting, the meat subsidy program, taken together with the meat ceiling price program, was generally fair and

equitable. The validity of the governing regulation must be seen as depending not upon its effect on a particular individual, but on the industry as a whole. *Bowles* v. *Willingham,* 321 U.S. 503, 516-519; *Seminole Rock & Sand Co.* v. *Fleming,* 160 F. 2d 542, 547 (Em. Ct. App.); *Van Der Loo* v. *Porter,* 160 F. 2d 110 (Em. Ct. App.), certiorari denied, 329 U.S. 774.

3. Petitioner's contention that the denial of its subsidy claim violates the due process clause of the Fifth Amendment also overlooks the fact that Section 2(e) of the Emergency Price Control Act, 50 U.S.C. App. 902(e), in authorizing subsidy programs, was never intended to create any contractual or vested rights in potential beneficiaries of subsidy programs. Section 2(e) merely sets forth a policy to be pursued in effecting the purposes of price control legislation; it confers no contractual rights. Cf. *Dodge* v. *Board of Education,* 302 U.S. 74. The Emergency Court of Appeals has ruled that meat subsidies are not absolute gratuities or bounties. *Illinois Packing Co.* v. *Snyder, supra; Earl C. Gibbs* v. *Defense Supplies Corporation, supra.* But it has never ruled that a claim for subsidy payment may be denominated a contract or property right, nor would such a holding be consistent with this Court's previous rejection of attempts to fashion contractual rights from declarations of legislative policy. See *Dodge* v. *Board of Education, supra; Cummings* v. *Deutsche Bank,* 300 U.S. 115, 122-124;

Maricopa County v. *Valley Bank*, 318 U.S. 357, 362; *United States* v. *Teller*, 107 U.S. 64, 68; *Frisbie* v. *United States*, 157 U.S. 160, 166.

4. Because the court below hypothetically referred to what it would consider an arbitrary and capricious proviso of a subsidy regulation, *i.e.*, one excluding from participation Democrats or Republicans or red-heads, petitioner apparently infers that the court considered its reviewing power to be limited thus narrowly and concludes that this amounts to "an abdication of the power entrusted to the court by Congress" (Pet. 12). Neither the inference nor the conclusion finds any justification either in the present decision or in past decisions of the Emergency Court of Appeals. Where the subsidy-paying agency has denied a justifiable claim by reason of an erroneous interpretation or application of its regulations, the court has not hesitated to correct the wrong. See *Maloney Packing Co.* v. *Reconstruction Finance Corp.*, 159 F. 2d 717 (Em. Ct. App.); *Belle City Packing Co.* v. *Reconstruction Finance Corp.*, 169 F. 2d 413 (Em. Ct. App.); *Earl C. Gibbs, Inc.* v. *Reconstruction Finance Corp.*, 169 F. 2d 654 (Em. Ct. App.); *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corp.*, 169 F. 2d 658 (Em. Ct. App.); *Royal Packing Co.* v. *Reconstruction Finance Corp.*, 169 F. 2d 999 (Em. Ct. App.); *Consolidated Flour Mills Co.* v. *Reconstruction Finance Corp.*, 177 F. 2d 206 (Em. Ct. App.).

CONCLUSION

The order denying petitioner's protest was fully authorized by the clear and unambiguous provisions of the controlling regulation, which is in all respects valid. The decision below is clearly correct; we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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